Petition

No. 81-567

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Supreme Court of the United States

October Term, 1981

COMMISSION HOUSE DRIVERS UNION LOCAL NO. 400, TRUSTEES OF THE COMMISSION HOUSE DRIVERS UNION LOCAL NO. 400 PENSION TRUST,
Petitioners,

vs.

ALEX SWACKARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. Whether an administrative decision of a Board of Pension Trustees may be overturned by a federal court absent a showing that it is arbitrary, capricious, made in bad faith, not supported by substantial evidence, or erroneous on a question of law.

2. Whether a plaintiff must exhaust available administrative remedies before being permitted to bring an action in federal court.

3. Whether an award of attorney's fees to Plaintiff was proper in the absence of Statutory authorization.

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

The only parties to the proceedings in this case before the Court of Appeals for the Sixth Circuit are the parties listed in the caption for this petition.

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No.

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Petitioners,

vs.

ALEX SWACKARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioner, Commission House Drivers Union Local No. 400, Trustees of the Commission House Drivers Union Local No. 400 Pension Trust, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered May 11, 1981.

OPINION BELOW

The opinion entered in this case by the Circuit Court of Appeals is reproduced as Appendix A. The Order of the Circuit Court denying the Petition for Rehearing and Rehearing En Banc is reproduced as Appendix C. The Judgment entered by the District Court is reproduced as Appendix B (Thomas, J., entered December 10, 1979).

JURISDICTION

This petition relies upon 28 U.S.C. Section 1254(1) and Supreme Court Rule 17.1 for jurisdictional ground. The decision of the Court of Appeals was entered on May 11, 1981. Rehearing was denied on June 22, 1981.

STATUTES INVOLVED

The pertinent statutes involved are 28 U.S.C. §1254 (1); 28 U.S.C. §1337; 28 U.S.C. §1920; 28 U.S.C. §2201; 29 U.S.C. §185; 29 U.S.C. §186 and 29 U.S.C. §1132. These statutes have been set forth in Appendix D.

STATEMENT OF THE CASE

Plaintiff-Appellee was a member of Defendant-Appellant Local 400 for a sufficient number of years to become eligible for participation in the Defendant-Trustees Pension Plan.

The Trustees enlarged their Pension Plan in 1964 to provide disability benefits. Eligibility requirements for the benefits were set forth within the amended plan.

From 1953 to 1962, Plaintiff was employed by an employer who participated in the Pension Plan. From 1965 to March of 1975 Plaintiff was employed by a different employer who participated in the Pension Plan. However, as is stipulated by the parties, Plaintiff was not employed with a participating employer during the period of 1962 through 1964.

Plaintiff alleged that he became totally disabled sometime prior to August of 1976 and that he therefore became eligible and entitled to receive disability benefits under the terms of the amended Pension Plan.

The Trustees of the Pension Plan denied Plaintiff's request for disability benefits. It had been determined through the unanimous decision of the Board of Trustees that the original intent of the Trustees in enacting the disability benefit provision was that *fifteen consecutive years* be worked in order to establish eligibility for disability benefits. This determination was made in reliance upon the definition of "service" in the original Pension Plan in which it was defined as "continuous employment." Plaintiff failed to qualify due to the three year break in service.

Plaintiff chose to contest the determination of the Trustees. The bargaining agreement provided that disputes between the parties be submitted to arbitration. Plaintiff, however, chose to bring an action in federal court before exhausting his administrative remedies.

Trial was had in the United States District Court for the Northern District of Ohio, Eastern Division, (Thomas, J.), on an agreed statement of facts which are attached and made a part hereof (Appendix G, pp. A39-A43, A46-A49). Jurisdiction to hear this action was conferred upon the court pursuant to the provisions of Sections 301 and 302 of the Labor Management Relations Act (29 U.S.C. Sections 185, 186), Section 502 of the Employee's Retirement Income Security Act (29 U.S.C. Section 1132), 28 U.S.C. Sections 1337 and 2201, and the Doctrine of Pendent Jurisdiction.

The trial court rendered judgment in favor of the Plaintiff on the basis of its determination that Plaintiff had a vested right to the disability benefits by the time that the Board of Trustees convened to make their determination on the issue of continued service. An award of attorney's fees was also made.

Appeal was taken to the United States Court of Appeals for the Sixth Circuit. The Appeals Court (Engel, Kennedy and Martin, Circuit Judges) affirmed in a *per Curiam* decision, but awarded no additional fees. However, the Appeals Court affirmed on the basis of what it determined to be a retroactive application of a "break-in-service" rule rather than on the basis of a vested right. In addition, the Appeals Court failed to address the issue of Plaintiff's failure to exhaust his administrative remedies—an issue that had been designated as an assignment of error by Defendant-Appellant.

Defendant petitioned for a Rehearing and Rehearing En Banc. Petition was denied.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IGNORED THE SETTLED LEGAL PRINCIPLE THAT AN ADMINISTRATIVE DECISION OF PENSION FUND TRUSTEES MAY NOT BE OVERTURNED ABSENT A SHOWING OF BREACH OF FIDUCIARY DUTY.

A. The Administrative Decision of the Pension Fund Trustees May Not Be Reversed Absent a Showing That It Is Arbitrary, Capricious or Made in Bad Faith.

As this suit has arisen under the Taft-Hartley Act subsection providing for enforcement of collective bargaining agreements (Section 301 LMRA; 29 U.S.C. Section 185), the substantive law to be applied is federal common law fashioned by the courts from the policy of national labor laws. *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 456, 77 S. Ct. 912, 918, 1 L. Ed. 2d 972 (1957).

The Board of Trustees, as administrators of the herein Pension Plan (Appendix F, pp. A23-A29), is the final authority with regard to any decisions which must be made concerning the operation of the Pension Plan Fund. The Trustees stand as fiduciaries to the beneficiaries of the Pension Plan and are, as such, charged with an equitable duty of fair representation. *Nedd v. United Mine Workers of America*, 400 F.2d 103, 105-06 & n.5 (3d Cir. 1968). The decisions of the Trustees are, of course, subject to review by the federal courts. However, there is a standard of review imposed upon the courts which must be met before a federal court may substitute its judgment for that of the Trustees.

The standard of review referred to was developed by the United States Court of Appeals, District of Columbia Circuit, in the case of *Danti v. Lewis*, 114 U.S. App. D.C. 105, 312 F.2d 345, 348 (1962). The *Danti* Standard posits that in cases involving individual claims to benefits which arise from pension trusts, the decisions of the trustees who administer such trusts may be reversed only where they are "arbitrary, capricious or made in bad faith, not supported by substantial evidence, or erroneous on a question of law." *Id.*

See also, *Kosty v. Lewis*, 115 U.S. App. D.C. 343, 319 F.2d 744, 747 (1963), *cert. denied*, 375 U.S. 964, 84 S. Ct. 482, 11 L. Ed. 2d 414 (1964); *Miniard v. Lewis*, 128 U.S. App. D.C. 299, 387 F.2d 864, 865 & n.4 (1967), *cert. denied*, 393 U.S. 873, 89 S. Ct. 166, 21 L. Ed. 2d 144 (1968); *Gomez v. Lewis*, 414 F.2d 1312, 1314 (3d Cir. 1969); *Rehmar v. Smith*, 555 F.2d 1362, 1371 (9th Cir. 1976), *rehearing en banc denied* (1977); *Aitken v. IP & GCU-Employer Retirement Fund*, 102 LRRM 2608, 2614-15, 604 F.2d 1261 (9th Cir. 1979).

In *Rehmar, supra*, 555 F.2d at 1371, the Ninth Circuit said:

> The District of Columbia Circuit recognized, in formulating that standard /i.e. the *Danti* Standard/, that the institutional arrangements creating 'welfare and pension trust funds and specifying their purposes 'are cast expressly in fiduciary form . . . .' *Kosty v. Lewis, supra,* 319 F.2d at 747; see also 29 U.S.C. Section 186 (c) (5) (directing that employers' contributions shall be held 'in trust'). To give meaning to the rights of beneficiaries involved in any fiduciary relationship, the courts have always found it necessary to subject the conduct of fiduciaries to judicial review and correction. *Id.* Where, however, the instrument defining the fiduciaries' duties gives them broad discretion, as is generally the case with welfare and pension trusts, the courts limit their review and intervene in the fiduciaries' decision only where they have acted arbitrarily or capriciously towards one of the persons to whom their trust obligations run.' *Id.* We find this standard of judicial review, which leads neither to abdication of traditional judicial control of fiduciaries nor to excessive judicial intervention in trust operations, in harmony with federal labor policy. Accordingly, if the *Danti* standard is a statement of state law, or general common law, it is a standard we adopt.

In the instant case, the decision of the Trustees to deny disability benefits to Plaintiff was a decision consistent with the Trustees' fiduciary duty of fair representation. The Trustees did not act arbitrarily or capriciously with respect to Plaintiff. In point of fact, Plaintiff's application provided the Trustees with their first opportunity to affirm their original intent in enacting the disability benefit provision of the Pension Plan. That intent was that an employee must have given fifteen years of continuous service before becoming eligible to receive disability benefits.

The letter from the Co-Administrator of the Pension Fund, in which Plaintiff's request to participate was denied, was made part of the record and all the statements made therein were stipulated to be true as part thereof and as agreed prior to argument before the trial court (See Appendix G, pp. A48, A49). In said letter it was stated that the "Board Members discussed the question at some length" and that it was "the unanimous decision of the Board to reaffirm that the original intent of the rule was that fifteen (15) years must be consecutively worked . . . ." The length of the discussion and the unanimity of agreement would seem to preclude any question of bad faith proceedings on the part of the Board.

Further, the evidential question is satisfied by reference to the definition of "service" (i.e. "continuous employment") set forth in the original Pension Plan and stipulated as true by the parties and made a part of the record for the trial court (See Appendix G, p. A40).

Finally, the Trustees did not err as a matter of law when denying Plaintiff's request to participate in the disability fund. The trial court made its award to Plaintiff based on its determination that Plaintiff had a vested right in the disability benefits. This determination was erroneous as a matter of law. The onset of a disability is a purely contingent event. As such, there can be no vested right in a disability pension until the contingency is satisfied. The amendments to the pension plan did not, therefore, vest such a right within any employee. Further, as was set forth in *Vaughan v. Metal Lathers Local 46 Pension Fund*, 474 F. Supp. 613, 621 (1979), *aff'd*, 626 F.2d 237 (2d Cir. 1980), "(D)isability pension rights do not vest under ERISA." In light of the above, it was folly for the trial court to make an award on the basis of a vested right.

B. Contra to the Determination of the Court of Appeals, No "Break-in-Service" Rule Was at Issue Here.

The Court of Appeals affirmed the holding of the lower court, but it did so by changing the issue. The lower court had determined that Plaintiff had a vested right in the disability pension benefits. The Court of Appeals, in recognizing the error of this determination, nevertheless sought to attain the same result and preserve a disability payment for the Plaintiff. The Court of Appeals accomplished this objective by transforming the "vested right" into a "break-in-service" rule. It erred, however, in doing so.

The Board of Trustees created the disability pension benefit herein of their own free will. This was a purely gratuitous benefit which the Board sought to provide to the union employees. This was not the product of contract negotiations. As such, the disability benefits were not capable of being classified as "rights." What the Board giveth, the Board may taketh away.

The Court of Appeals apparently recognized this to be true. There was no discussion of "vested rights" in the transcribed opinion of the Court of Appeals. Instead, the Court of Appeals affirmed the finding of the lower court, explaining that the "denial of benefits in this case amounts to a retroactive application of a 'break-in-service' rule." (Appendix A, p. A3).

In support of this theory, the Court of Appeals cited *Burroughs v. Board of Trustees*, 542 F.2d 1128 (9th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977) and *Hodgins v. Central States Southeast and Southwest Areas Pension Fund*, 624 F.2d 760 (6th Cir. 1980). Both cases, however, are clearly distinguishable.

In point of fact, the applicable Bargaining Agreement (Appendix F, pp. A23-A29) contained no "break-in-service" rule. As such, the reasoning of the Court of Appeals can be applied only in an analogous sense. However, even assuming *arguendo* that a "break-in-service" rule was here applicable, the authority relied upon by the Court of Appeals is easily distinguished away.

In *Burroughs, supra,* 542 F.2d 1128, the retroactive application of a "break-in-service" rule was found to be a denial of fundamental due process where the employee had not been informed of the adoption of such a rule by the employer. The rule, which the district court had determined to be reasonable on its face, had been adopted subsequent to the plaintiff's employment, but prior to his injury.

In *Hodgins, supra,* 624 F.2d 760, there was also a question of notice; hence, another due process argument. Here, an employee's work classification status, for the purpose of union participation, had been changed, unbeknownst to him, from "employee" to "supervisor." At no time, however, did he stop paying his union dues. He was never notified of his reclassification, nor was he apprised of his subsequent ineligibility to participate in the pension plan to which he had dutifully paid.

Unquestionably, an uncompensated taking occurred in each of the above cases. The same cannot be said with reference to Plaintiff Swackard.

In *Burroughs, supra,* "a "break-in-service" rule had been adopted while the employee was in the service of employer. In the instant case, the disability fund amendment was grafted onto the pre-existing pension fund plan during the three-year period of Plaintiff Swackard's voluntary disassociation from unionized employment. The employee in *Burroughs* was a dues-paying employee at all

times pertinent. Plaintiff Swackard voluntarily sought employment where he would not be obligated to pay union dues. Hence, while it is clear that the union in *Burroughs* owed to the employee a duty of notice, no such notice was owing to Swackard. There was no denial of fundamental due process to Plaintiff Swackard because, as a non-union employee, there was no duty owed to him by Defendants.

Likewise, in *Hodgins, supra,* the plaintiff was at all times pertinent a dues-paying union employee. There was a duty owed to him. No such duty devolved to the Union in the case of Swackard.

The decision of the trial court and its subsequent affirmation on appeal places a cloud over what was previously a clear and unequivocal rule of law. Before this decision, it was clear that where the parties to an agreement had so stipulated, a Board of Trustees could render a decision within its sphere of competence without fear that the judiciary would tamper with it, absent a showing of arbitrary, capricious or bad faith dealings. Now, this policy, which is clearly the law in the Third, Ninth and District of Columbia Circuits, has been rejected by the Sixth Circuit Court of Appeals. The time is ripe to resolve this matter.

Clearly, in this case we have an agreed statement of facts (Appendix G, pp. A39-A43, A46-A49) which squarely presents the issue of the authority of the Trustees to interpret the pension and disability plans.

If this decision is permitted to stand, all such agreements will be rendered meaningless. Trustees will be seen (at least within the territory embraced by the Sixth Circuit) as powerless to really preside over their respective pension and disability plans. Trustees will still render

opinions, but they will do so with the knowledge that a back door to the court is open through which a disgruntled party may enter and seek to have the opinion rendered meaningless without the necessity of a showing of good cause.

II. THE DECISION BELOW IGNORED THE SETTLED LEGAL PRINCIPLE THAT A PLAINTIFF MUST FIRST EXHAUST AVAILABLE ADMINISTRATIVE REMEDIES BEFORE HE CAN BE ADMITTED INTO FEDERAL COURT.

Plaintiff Swackard, when notified of the decision of the Trustees of the Pension Fund to deny his participation in the disability benefits, chose to contest this determination. The Bargaining Agreement which determined the relationships and responsibilities of the parties (Appendix F, pp. A23-A29) contained a provision (Article II, Section 4) requiring that disputes be submitted to arbitration. The Section reads as follows:

> Any participant who has a grievance against any action or determination of the Trustees may present such grievance to a committee of three, with one member appointed by the Trustees, one by his employer and the third by himself. The decision of such committee shall be final if consistent with the plan.

Plaintiff chose to ignore this provision, and instead, proceeded to bring his grievance in federal court. Defendants affirmatively set forth the defense of failure of Plaintiff to exhaust his administrative remedies. The trial court disposed of this defense by proclaiming at trial that the arbitration provision quoted was not necessarily applicable (Appendix E, p. A22).

Defendants-Appellants, in their petition for rehearing, specifically assigned as error the issue of failure to exhaust

administrative remedies after the Court of Appeals failed to address this assignment of error in its initial review of the case. The petition for rehearing was deemed not worthy of further consideration.

This Court, in the case of *Republic Steel Corporation v. Maddox*, 379 U.S. 650, 85 S. Ct. 614, 13 L. Ed. 2d 580 (1965), stated the following:

> As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as a mode of redress.
>
> . . . . .
>
> (I)t cannot be said in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so. 85 S. Ct. at 616.

In *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S. Ct. 1048, 47 L. Ed. 2d 231 (1976), this Court reviewed the body of federal common law regarding the settlement of labor disputes through the use of contractual procedures. Within this review, the Court said with regard to *Maddox, supra,*

> (W)e later held that an employee could not sidestep the grievance machinery provided in the contract and that unless he attempted to utilize the contractual procedures for settling his dispute with his employer, his independent suit against the employer in the District Court would be dismissed. 96 S. Ct. at 1055-56.

In light of the above, then, it should be clear that the decision of the trial court to entertain jurisdiction of

the instant matter was erroneous. The failure of the Court of Appeals to reverse and dismiss the action was also erroneous.

Having been presented with a situation wherein the Plaintiff did not even *attempt* to make use of the available contract grievance procedure, the district court should have dismissed the action submitted to it. It was error to have done otherwise.

Again, this decision puts Defendant-Appellant in the position of not knowing what to do. The law on this point has been settled by this Court. Yet, the lower court has decided to make its own law. As if this isn't bad enough, the court in question can't even seem to be consistent in its application of this point of law. In *Commission House Drivers, Helpers and Employee's Union Local No. 400 Affiliated With The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; and Louis Whitman v. American Seaway Foods, Inc.*, Case No. 77-1227, the Court of Appeals for the Sixth Circuit affirmed the decision of the trial court wherein the court granted summary judgment and dismissed the complaint, with prejudice, because the plaintiff therein had failed to exhaust his administrative remedies before bringing the action in federal court. The same trial court judge issued both that decision and the one presently being appealed from. Defendant herein was the Plaintiff on that occasion.

Such inconsistency is intolerable. It is manifestly unfair for a litigant to be made subject to the whim of a jurist who shapes the law to fit the occasion. *Either* a plaintiff must exhaust his administrative remedies before being permitted to bring his action in federal court *or* he may bring his action without adhering to this procedure. The law must be made uniform in its application. A plaintiff cannot be required to anticipate correctly how the

mood of a particular jurist on a given day will affect his application of a point of settled law.

If this decision is permitted to stand, a previously settled point of law will once again become discretionary upon individual judges. While the concept of judicial review empowers judges to "interpret" law, it does not authorize "interpretation" to the extent that a law is stripped of its meaning.

III. THE DECISION BELOW IGNORED THE SETTLED LEGAL PRINCIPLE THAT AN AWARD OF ATTORNEY'S FEES, IN THE ABSENCE OF STATUTORY AUTHORIZATION, IS IMPROPER.

The Trial Court rendered judgment in favor of Plaintiff and then made an award of attorney's fees to the Plaintiff as well. This was error on the part of the Court.

The law on this point was set forth by this Court in *The Baltimore*, 8 Wall. 377, 19 L. Ed. 463 (1869). The Court said at 8 Wall. 392:

> Attorneys, solicitors and proctors may charge their clients reasonably for their services, in addition to the taxable costs, but nothing can be taxed as costs against the opposite party, as an incident to the judgment, for their services, except the costs and fees therein described and enumerated.

The current statutory provision describing and enumerating the taxation of costs is 28 U.S.C. Section 1920 (Appendix D, pp. A6, A7). Nothing within this section specifically provides for an award of attorney's fees. Indeed, in *Fleischmann Distilling Corporation v. Maier Brewing Co.*, 386 U.S. 714, 87 S. Ct. 1404, 18 L. Ed. 2d 475 (1967), Chief Justice Warren said at 87 S. Ct. 1408, with reference to 28 U.S.C. Section 1920:

Moreover, since with the exception of the docket fee provided by 28 U.S.C. Section 1923(a), the statutory definition of the term "costs" does not include attorney's fees, acceptance of petitioner's argument would require us to ascribe to Congress a purpose to vary the meaning of that term without either statutory language or legislative history to support the unusual construction.

So too, in the instant case, the award of attorney's fees by the Trial Court, absent statutory authorization, is an award which flouts the intent of Congress with respect to this matter.

If this decision is permitted to stand, a previously settled point of law will once again become discretionary upon individual judges.

IV. SINCE A GREAT NUMBER OF PEOPLE ARE INVOLVED WITH PRIVATE PENSIONS, BOTH AS ADMINISTRATORS AND RECIPIENTS, A QUESTION OF GREAT PUBLIC IMPORTANCE ARISES AS TO THE PROPRIETY OF THE FEDERAL JUDICIARY ASSUMING LEGISLATIVE FUNCTIONS IN THE NAME OF JUDICIAL REVIEW.

The position of Petitioner herein was fully corroborated by rules of contract law, statutory law and case law which have evolved throughout the federal judicial system and have been imbued with the imprimatur of this Supreme Court. The ruling of the Trial Court, however, was not substantiated by one authority other than the word of the judge himself. The judge wanted to achieve a result. The settled law in this area stood inconveniently in his path, however, so he ignored it and went around it. In the process, he trampled the rights of the Trustees to ad-

minister the pension fund as they had been authorized to do. His rationale, though not verbalized, was quite clearly the old story of the ends justifying the means.

This ruling is symptomatic of an attitude which has become all too prevalent among the individual members of the federal judiciary: *i.e.*, that a federal judge need not feel fettered by the confines of the judicial branch of government, but that he may assume the powers of the legislative branch as well. The attitude seems to embody a belief that the federal judiciary is empowered to make law as well as to enforce it, and the weights and balances of a tripartite government be damned.

The message transmitted to the citizenry by such behavior on the part of the courts is that the three branches of our government are not quite as equal as we have all been led to believe. Worse, there is the sickening realization that the franchise to vote can easily be transformed into but a hollow ritual. This becomes evident when a federal judge decides to impose his will upon the people, negating the force and effect of their collective decisions, or those of their elected representatives.

The effect of this arrogant power-grabbing will inevitably be disdain for law, any law. As long as people believe that ours is a government of laws, not of men, then people will have respect for the government and its institutions. It is not necessary to indulge here in a sermon, rehashing the breach of faith and public trust which accompanied the Watergate and Abscam episodes. Suffice to say that the federal courts, in the wake of such political scandals, are now, more than ever, the repositories of the public trust. When courts break the trust, laws cease to command respect. A law's command of obedience is hollow indeed if those to whom the command is directed have ceased to attach a purpose to the law's existence.

In the August 1981 issue of READER'S DIGEST, United States Representative John Ashbrook (R. Ohio) has authored an article entitled *"Are Judges Abusing Our Rights?"* In this article Congressman Ashbrook sets forth some of the more blatant recent examples of the federal judiciary overreaching its constitutional powers. The Congressman concluded his article with the following paragraph:

> At stake in the struggle to control our high-handed judiciary is nothing less than the sanctity of the law itself in our constitutional system. As the distinguished legal historian Raoul Berger asks, "How long can public respect for the Court survive if people become aware that the tribunal which condemns the acts of others as unconstitutional is itself acting unconstitutionally?"

The question, posed by Prof. Berger and adopted by Rep. Ashbrook, is one to which we would hope that an answer need never be supplied. Our hopes, however, are not buoyed with optimism.

In the case at hand, a good-faith effort was expended by the Administrators of the Fund to reach a decision in what was a case of first impression. Consultation was had with the legal staff of the John Hancock Insurance Company, the insurer of the Fund, as to the propriety of the Administrators' proposed acts. At least twenty different attorneys expressed the opinion that the Board possessed the legal authority to deny Plaintiff Swackard's participation in the disability Fund. The basis of this decision was that this was a point of settled law (*i.e.*, the *Danti* standard). The trial judge disregarded this unanimous collective professional judgment. This was not an instance of judicial interpretation of law; rather, it was an instance of a judge making himself the law.

To a disinterested party, the trial judge's decision has a humanitarian quality to it. Here was a situation where an injured party was awarded compensation because a sympathetic jurist cut through an entanglement of red tape and strings. It would be a touching scenario if not for the presence of some inconvenient facts, facts which indicated that there was no relationship between the Plaintiff and the Defendants which would have entitled Plaintiff to a recovery from Defendants.

It is all too easy to spend someone else's money. The Plaintiff may indeed have incurred a complete disability (though this has never been proved to Defendants' satisfaction). The question remains to be answered whether the Defendants were the proper parties to have compensated him for such. The mere existence of a disability fund, such as that established by Defendants herein, sets a potential plaintiff to salivating. Indeed, a minimum of imagination is necessary to conjure up an argument which casts the plaintiff as an underdog and puts the administrators of such a fund in an unsympathetic light. However, participation in such a fund must necessarily be restricted on the basis of entitlement rather than sympathy. Administrators of such funds are charged with the responsibility of preserving the assets of a *trust res* (the Fund) in order that deserving employees will be able to rightfully participate.

The trial judge herein may well have been motivated to act by a sense of compassion. However, his motivation is essentially immaterial. His job is to see to it that the rights of all parties are respected. He has been made the arbiter on questions of law. His decisions, if they are to command respect, must be consistent and true to the law.

If this decision is permitted to stand, it will only encourage other federal judges to continue their practice of

rewriting existing law to suit their fancy. This abhorrent practice should be denounced by this Court at the soonest possible opportunity.

CONCLUSION

For the reasons stated above, Petitioners respectfully submit that a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals and that a reversal of said opinion should be granted.

Respectfully submitted,

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September 18, 1981

APPENDIX A

Opinion of the Court of Appeals for the Sixth Circuit

(Decided and Filed May 11, 1981.)

No. 79-3722

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALEX SWACKARD,
Plaintiff-Appellee,

v.

COMMISSION HOUSE DRIVERS UNION LOCAL NO. 400, TRUSTEES OF THE COMMISSION HOUSE DRIVERS UNION LOCAL NO. 400 PENSION TRUST,
Defendants-Appellants.

APPEAL from the United States District Court for the Northern District of Ohio.

Before: ENGEL, KENNEDY, and MARTIN, *Circuit Judges.*

PER CURIAM. This case poses the question of whether Alex Swackard is eligible to receive disability benefits from the Pension Trust of the Commission House Drivers Union Local No. 400. Swackard was employed by a participating employer from 1953 to 1962 and from 1965 to 1975. He claims that sometime prior to August of 1976 he became totally disabled. His application for disability benefits was denied. The co-administrator of the Pension Trust notified Swackard that he was ineligible for consideration because although he had nineteen years of credited service, he did not have the fifteen consecutive

years of service required for eligibility. Swackard then filed this action pursuant to both the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.*, and the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* The District Court entered judgment for Swackard, declaring that he was eligible for consideration for disability benefits. The court also granted Swackard attorney's fees.

The Union's pension plan contains the following definition in paragraph eleven: " 'Service' means continuous employment with one or more Employers who satisfy the requirements for eligibility and agree to be bound by the Agreement and Declaration of Trust." In March, 1964, the Union added a disability benefit program to the regular pension plan. The eligibility provision stated: "A Participant who has both attained his fiftieth birthday and completed at least fifteen years of Credited Service, and who is deemed to have incurred a Total and Permanent Disability, shall be eligible for a Disability Benefit . . . ."

The District Court held that the definition of "Service" in paragraph eleven did not apply to the disability benefit provisions which were later added to the plan. In so doing, the court referred to the minutes of the August 12, 1976 meeting of the plan's trustees at which Swackard's eligibility was discussed. Those minutes stated: "The Administrators advised the Board that several other questions had recently been raised regarding interpretations of certain points of the Pension Plan rules. . . . (2) In the case of eligibility for a disability pension, there is a requirement for fifteen years of service, but the Plan is silent as to whether or not those fifteen years must be consecutive." The court concluded from this that the Trustees determined that the plan was silent on the question of whether the fifteen years of service had to be consecutive. It reasoned that by denying Swackard's application, the trustees effectively inserted a new rule into

the plan, and by doing so retroactively deprived Swackard of a vested right in violation of ERISA.

We agree. In light of the trustees' conclusion that the plan was silent as to the necessity of fifteen consecutive years of employment, their denial of benefits in this case amounts to a retroactive application of a "break in service" rule. *See Burroughs v. Board of Trustees*, 542 F.2d 1128 (9th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977). *See also Hodgins v. Central States Southeast and Southwest Areas Pension Fund*, 624 F.2d 760 (6th Cir. 1980).

The judgment of the District Court is affirmed. No additional fees are awarded.

APPENDIX B

Judgment Entry of the United States District Court

(Filed December 10, 1979)

Civil Action File No. C 78-714

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

ALEX SWACKARD

vs.

COMMISSION HOUSE DRIVERS UNION LOCAL NO. 400, *et al.*

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable William K. Thomas, United States Dis-

trict Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered, in favor of the plaintiff.

It is Ordered and Adjudged that the plaintiff has met the disability benefit eligibility requirements as stated in the court's oral opinion rendered on October 25, 1979.

IT IS FURTHER ORDERED that the court's oral opinion is hereby adopted as findings of fact and conclusions of law, in accordance with Rule 52, Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that Alex Swackard upon showing as required under the provisions of the Plan in effect on August 12, 1976, that he, Alex Swackard, was totally and permanently disabled on or prior to August 12, 1976, that he, Alex Swackard, is declared to be entitled to payment to him of all Disability Benefits, past, present and future, which he would have received had the erroneous August 12, 1976, determination by the Trustees not been made.

/s/ WILLIAM K. THOMAS
U.S.D.C. Judge

APPENDIX C

Order of the United States Court of Appeals for the Sixth Circuit Denying Petition for Rehearing

(Filed June 22, 1981)

No. 79-3722

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALEX SWACKARD,
Plaintiff-Appellee

v.

COMMISSION HOUSE DRIVERS UNION LOCAL NO. 400, TRUSTEES OF THE COMMISSION HOUSE DRIVERS UNION LOCAL NO. 400 PENSION TRUST,
Defendants-Appellants

ORDER

Before: ENGEL, KENNEDY, and MARTIN, *Circuit Judges.*

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above-styled case; and

No judge in active service in this Court having moved for rehearing en banc and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the Court's per curiam,

Now, therefore, the motion for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

APPENDIX D

Statutes Involved

28 U.S.C. § 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1337. Commerce and anti-trust regulations

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

28 U.S.C. § 1920. Taxation of costs

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

28 U.S.C. § 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

29 U.S.C. § 185. Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agents; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another

person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

29 U.S.C. § 186. Restrictions on financial transactions

Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce

with intent to influence him in respect to any of his antions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

Request, demand, etc., for money or other thing of value

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or deilvery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided,* That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

Exceptions

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who

is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the

employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B)

child care centers for preschool and school age dependents of employees: *Provided,* That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further,* That no such legal service shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959.

Penalty for violations

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

Jurisdiction of courts

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

Effective date of provisions

(f) This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

Contributions to trust funds

(g) Compliance with the restrictions contained in subsection (c)(5)(B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

29 U.S.C. § 1132. Civil enforcement

Persons empowered to bring civil action

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

Plans qualified under Internal Revenue Code

(b) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(1) requested by the Secretary of the Treasury, or

(2) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

Administrator's refusal to supply requested information

(c) Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

Status of employee benefit plan as entity

(d) (1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not

designated in the summary plan description of the plan as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

Jurisdiction

(e) (1) Except for actions under subsection (a) (1) (B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a) (1) (B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

Amount in controversy; citizenship of parties

(f) The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

Attorney's fees and costs

(g) In any action under this subchapter by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

Service upon Secretary of Labor and Secretary of Treasury

(h) A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

Administrative assessment of civil penalty

(i) In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975(f)(4) of Title 26); except that if the transaction is not corrected (in such manner as the Secretary shall prescribe by regulation, which regulations shall be consistent with section 4975 (f)(5) of Title 26) within 90 days after notice from the

Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

Direction and control of litigation by Attorney General

(j) In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

Jurisdiction of actions against Secretary of Labor

(k) Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this Act, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

APPENDIX E

Relevant Portions of Trial Transcript

[21] The Court: Okay. But that six months then would be—

Mr. Geraci: No. Your Honor, he was working there, as I understand it, as a casual.

The Court: Very well. The stipulation prevails.

Mr. Belkin: Right.

Mr. Geraci: Yes.

The Court: Very well.

Mr. Geraci: Your Honor, I would also like the first page—since we are admitting C—the first page of the Trust plan to be admitted into evidence also.

Mr. Belkin: Could I see it?

Mr. Geraci: Yes.

The Court: You mean the minutes? C is the minutes.

Mr. Geraci: No. The [22] plan document itself.

The Court: Well, that hasn't been given a letter yet as an Exhibit.

Mr. Geraci: "Article I, definitions." I think we already have it in there.

The Court: What is the point about admitting this?

Mr. Geraci: Well, we would like to admit this into evidence. (Indicating.)

The Court: Well, admit the whole thing.

Mr. Geraci: Okay.

The Court: The whole point was that I thought it would be helpful to have the entire plan.

Mr. Geraci: Fine.

The Court: And not just the part that you attached to your stipulation.

Mr. Belkin: Your Honor, as to the admission of the plan, I would just like to state for the record—

[23] The Court: Before we get to that, I just want to be sure that we actually know what the full plan was in effect.

For example, I find that in 1965, the disability benefit provision was amended—that's been handed me here—and I don't see that it changed the eligibility provision, which is Article III, Subsection III, but the amounts and the amount of the benefit were changed.

Mr. Belkin: I just wanted to state that in Interrogatory Number 11 that I propounded to Defendant as stated, "Specify each provision of the governing document in effect as of March 27, 1975 on which the denial of Alex Swackard's claim for disability benefits payable from the Trust was based".

The answer was, "Plan document and amendments, meeting and Trust agreement, and especially the portions of the answers filed by the Defendant herein," which were the three pages that have been attached to the stipulation. And I have been working under [24] the belief, as indicated by Mr. Geraci, that these were the only applicable portions.

On that basis, I have a reservation about the whole pension plan, but—

The Court: Well, you can't construe a part of the plan. You have to construe a whole plan, I would think.

Mr. Belkin: Okay.

The Court: And therefore, I would ask that I receive the entire plan.

Mr. Belkin: Yes, your Honor.

The Court: With all due deference to counsel.

I'm not sure, though, about the several amendments, whether or not these have changed. I gather what you gave me is the original plan?

Mr. Geraci: And all the amendments up until the time that I got the copies.

There may be some amendments that have been misplaced or are not in there, but as far as I know, those are all the amendments.

* * * * *

[48] Mr. Geraci: Article II: "The plan shall be administered by the Trustees and, subject to the procedure provided in Section 4 below for resolving grievances, actions and determinations of the Trustees with respect to the eligibility of any participant, his rights to benefits hereunder and other questions arising in the administration of the plan will be final."

Subsection 4 provides that, "Any participant who has a grievance against any action or determination of the Trustees may present such grievance to a committee of three, with one member appointed by the Trustees, one by his employer and the third by himself. The decision of such committee shall be final if consistent with the plan."

I don't believe this stuff was followed by the Plaintiff in this action, and it was an issue presented in our answers originally.

The Court: Well, I would think, though, that probably the action that the Board [49] took went beyond the question of administrative exhaustion of remedies, I would think, since the Board took a different approach in turning it down.

Mr. Geraci: I believe the language, the definitions clearly spell out what "service" means.

In comparing this plan's document with the plan document that was referred to in the Court's Exhibit 1, you will note that definition 11 was left out. The reason that—I didn't find it on reviewing it—and I am just as-

suming that the reason that definition 11 was left out, was because it was included in the portion dealing with disability benefits, that the 15 years be continuous.

Here it was in the same document that "service" was being continued employment; and Mr. Belkin has pointed out that that is not included in the disability-eligibility portion of the plan, because that merely says 15 years of credited service.

* * * * *

APPENDIX F

Relevant Portions of Pension Plan

PENSION PLAN

COMMISSION HOUSE DRIVERS UNION, LOCAL 400
ESTABLISHMENT OF PLAN

The Commission House Drivers Union, Local 400 Pension Plan is hereby established, effective September 1, 1961 for the purpose of providing Retirement Benefits. This Pension Plan is authorized by the Agreement and Declaration of Trust, dated June 7, 1962 by and between the Trustees representing the Commission House Drivers Union, Local 400 and the Trustees representing the Employers.

ARTICLE II

ADMINISTRATION

(1) The Plan shall be administered by the Trustees and, subject to the procedure provided in section (4) below for resolving grievances, actions and determinations of the Trustees with respect to the eligibility of any Participant, his rights to benefits hereunder and other questions arising in the administration of the Plan shall be final.

(2) Each Participant and Employer shall, from time to time, furnish the Trustees such data as may be considered necessary by the Trustees to administer this Plan. Each such Participant and Employer shall fully cooperate with the Trustees in its administration of the Plan.

(3) As a condition to his right to receive a Retirement Benefit hereunder, each Participant eligible therefore, prior to the date of his retirement, shall file with the Trustees an application for such Retirement Benefit in such form as the Trustees may prescribe. No Retirement Benefit shall be paid to a Participant until he shall have complied with the terms of this Article. Promptly, upon receipt of such application, the Trustees shall determine whether or not such applicant is entitled to a Retirement Benefit hereunder, and if so, the amount thereof, and shall notify such applicant of its findings.

(4) Any Participant who has a grievance against any action or determination of the Trustees may present such grievance to a committee of three, with one member appointed by the Trustees, one by his Employer, and the third by himself. The decision of such committee shall be final if consistent with the Plan.

AMENDMENT NO. 3

LOCAL 400 FOOD TERMINAL EMPLOYEES PENSION FUND

AMENDMENT TO BE ATTACHED TO AND MADE A PART OF THE LOCAL 400 FOOD TERMINAL EMPLOYEES PENSION PLAN

It is understood and agreed that, effective March 1, 1964, the following modifications and alterations are hereby made in this Plan:

1. Article I. Definitions: The following definitions are added to this Article:

"12. 'Disability Benefit' means the benefit which may be payable to a Participant who has a Total and Permanent Disability as provided herein.

13. 'Total and Permanent Disability' means a disability by which a Participant is presumed, upon examination by a licensed medical doctor selected by the Trustees, or upon the granting of a disability pension award by the Federal Social Security Administration if the Trustees so desire, to be wholly and permanently prevented from engaging in any occupation or employment for wage or profit during the remainder of his life, as a result of bodily injury or disease, either occupational or non-occupational in cause, but excluding disability incurred while in the service in the Armed Forces of any country and excluding also disabilities which extend from chronic alcoholism or addiction to narcotics or disability caused by such Participant's engagement in a felonious act."

2. Article III. Eligibility for Benefits. The following section is added to the end of and made a part of this Article:

"(3) Disability Benefit:

A Participant who has both attained his fiftieth birthday and completed at least fifteen years of Credited Service, and who is deemed to have incurred a Total and Permanent Disability, shall be eligible for a Disability Benefit if he has been disabled for a period of six consecutive months and if such disability is established to the satisfaction of the Trustees."

3. Article IV. Should be amended to read:

"AMOUNT OF BENEFIT

(1) Annual Amount of Retirement Benefit:

(a) For a Participant with 10 or more years of Credited Service on his retirement date, $840.

(b) For a Participant with less than 10 years of Credited Service on his retirement date, $84.00 multiplied by the number of years of his Credited Service up to a maximum of 10 such years of Credited Service.

(c) For a disabled Participant upon attaining his retirement date, an amount equal to the yearly Disability Annuity benefit he has been receiving.

(2) Annual Amount of Disability Benefit:

The annual amount of Disability Benefit payable to a Participant who has become eligible therefor shall be equal to the greater of (a) and (b) below.

(a) $600.

(b) $840 multiplied by the appropriate percentage, based on the number of years by which the commencement of his Disability Benefit precedes the retirement date of the Participant and determined in accordance with the Schedule below.

SCHEDULE

Number of Years by which the commencement of the Disability Benefit precedes the Retirement Date of the Participant	Percentage Applicable on Commencement of Disability Annuity payment
0	100.0%
1	90.4
2	82.1
3	74.8
4 or more	68.4

If the number of months, between the Participant's Retirement Date and the date on which his Disability Benefit is to commence, is not a multiple of 12, the appropriate percentage shall be determined by interpolation."

4. Article V. Annuity Provisions. The following section is added to the end of and made a part of this Article:

"(2) The first monthly payment of the Disability Benefit for which a Participant is eligible shall be payable when the disablement has existed for six months and is total and permanent as determined by the Trustees. The Trustees shall specify in a written notice to the Insurance Company the date the Participant has become eligible therefor. Subsequent payments, as described in Section 2 of Article IV, will normally be made on the first day of each month ceasing on the earlier of:

(a) The first day of the month preceding the Participant's death.

(b) The date of recovery from such disability.

(c) The first day of the month preceding the month in which the Participant is eligible to receive a Retirement Benefit as determined in item (c) of Section (1) of Article IV.

If (b) above becomes applicable and the Participant resumes employment with an Employer, he will be eligible to retire and receive a Retirement Benefit. Such benefit will be determined in accordance with item (a) or (b) of Article IV, whichever is applicable, based on his years of Credited Service, subject to the maximum of 10 years of Credited Service. If (c) above becomes applicable and the Participant is living on the first day of the month he is eligible to receive a Retirement Benefit, such benefit to be determined in accordance with item (c) of Section (1) of Article IV. Any Participant receiving a Disability Benefit may be required by the Trustees to submit to medical examination by a medical doctor selected by the Trustees not more frequently than semi-annually to determine whether he continues to suffer a Total and Permanent Disability. If it is found that he no longer suffers a Total and Permanent Disability, or if he engages in gainful employment before age sixty-five, his Disability Payments shall cease. In the event he refuses to submit to a medical examination, he will be deemed to have recovered from such disability."

5. Article VII. Amendment or Termination: The following changes are made in Section (2):

Items (b) and (c) and the paragraph thereafter are amended and item (d) is added in the following manner:

"(b) Second, to Participants not included in (a) above, who are on the date of termination of the Plan, receiving a Disability Benefit;

(c) Third, to Participants not included in (a) or (b) above who have completed 10 years of Credited Service; and

(d) Fourth, to all remaining Participants who are not included in (a), (b), or (c) above.

For the purposes of (a), (b), (c) or (d) of this Section 2, with respect to each Participant for whom a Retirement Benefit has been provided upon termination of the Plan in accordance with this Section, such Retirement Benefit shall become payable on the later of the date of such termination of the Plan or the first day of the month coincident with or otherwise next following the 65th birthday of such Participant. With respect to benefits to be provided under (b) above, such benefits shall be equal to the Retirement Benefit to which he is entitled as outlined in item (c) of Section 1 of Article IV and shall commence on the date of termination of the Plan and be payable for life. If the assets remaining in the Pension Fund are insufficient to provide the benefits for Participants of any such class order of precedence, the annual amount of the Retirement Benefit to be provided for each Participant of such class to the exclusion of the succeeding classes shall be proportionately reduced so that the Pension Fund is completely exhausted."

Dated and signed this 15th day of June 1964, at Cleveland, Ohio.

Employer Trustees:	Union Trustees:
/s/ William M. Neye	/s/ Charles Cimino
/s/ Anthony Geraci	/s/ Wm. Sauerhiemer
/s/ (Illegible)	/s/ (Illegible)

APPENDIX G

Joint Appendix Submitted to Court of Appeals

DISTRICT COURT DOCKET SHEET

6/20/78 COMPLAINT filed. Summons issued to U. S. Marshal.

7/3/78 ANSWER OF DEFTS. filed with interrogatories. copies mailed 7/3/78

7/11/78 MOTION OF PLTF. for leave to amend his complaint (attached) filed. copies mailed 7/10/78

7/11/78 SUMMONS RETURNED AND FILED. served Trs. of the Commission House & Commission House Local 400 on 6/21/78. Fees $6.00

7/17/78 ENDORSED ORDER GRANTING PLTF. LEAVE to amend complaint filed. Thomas, J.

7/17/78 AMENDED COMPLAINT filed. copies mailed 7/10/78. Summons issued to U. S. Marshal.

7/25/78 NOTICE OF DEFTS. to Depose (Duces Tecum) Pltf. on 8/1/78 at 2:00 p.m. filed. Copy mailed 7/24/78.

7/24/78 INTERROGATORIES OF PLTF to deft Commission House Drivers Union Local #400 Pension Fund (set #1) filed. Copies mailed 7/24/78.

7/28/78 LETTER OF ATTY. GERACI THAT original answer of defts. shall stand for the amended complaint filed. copies mailed

8/10/78 ENDORSED ORDER GRANTING that original answer of defts. serve as answer to amended complaint filed. Thomas, J. copies issued

8/11/78 SUMMONS RETURNED and filed. Served Commiss. House Drivers . . . Pension Trust on 7/27/78 (re am. complt.) Fees $3.00

8/16/78 ANSWERS OF PLTF. TO DEFTS. INTERR. filed. copies mailed 8/10/78

10/13/78 ANSWERS OF DEFTS. TO PLTFS. interrogatories filed. c/m 10/10/78

7/6/79 PROPOSED Pre-Trial Order of pltf. filed. No service stated.

7/6/79 MINUTES of Pre-Trial Proceedings filed. Thomas, J. Kitchen, R. Trial set for 10/25/79 at 9:00 a.m.

10/23/79 STIPULATIONS OF THE PARTIES filed.

10/25/79 MINUTES OF PROCEEDINGS filed. Thomas, J. Bishilany, r (Orol argument - Court Rules in in favor of pltf., who is to submit proposed order).

11/1/79 MOTION OF PLTF. for determination of attorneys' fees filed. c/m 11/1/79

11/20/79 NOTICE OF APPEAL by deft. re: 10/25/79 filed. Copies by Clerk to Belkin, Geraci & U.S.C.A., Sixth Circuit.

AMENDED COMPLAINT

(Trial by Jury Demanded on All Issues Pursuant to Rule 38(b) Federal Rules of Civil Procedure)

Case No. C78-714

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT TO OHIO
EASTERN DIVISION

ALEX SWACKARD, 1144 East 79th Street, Cleveland, Ohio 44103,
Plaintiff

vs.

COMMISSION HOUSE DRIVERS UNION, LOCAL NO. 400, 2070 East 22nd Street, Cleveland, Ohio 44115,

THE COMMISSION HOUSE DRIVERS UNION, LOCAL No. 400, PENSION TRUST, 2191 East 19th Street, Cleveland, Ohio 44115,

and

TRUSTEES OF THE COMMISSION HOUSE DRIVERS UNION, LOCAL No. 400, PENSION TRUST, 2191 East 19th Street, Cleveland, Ohio 44115,
Defendants.

FIRST CLAIM

1. Jurisdiction to hear this action is conferred upon this Court pursuant to the provisions of Sections 301 and 302 of the Labor Management Relations Act (29 U.S.C. §185, 186), Section 502 of the Employee's Retirement Income Security Act (29 U.S.C. §1132) 28 U.S.C. §§1337 and 2201 and the Doctrine of Pendant Jurisdiction. The

Northern District of Ohio is the proper district for the maintenance of this action in that (a) substantially all of the transactions constituting violations alleged herein occurred in this district and (b) the defendants can be found and/or transact business in this district.

2. Plaintiff is an individual residing at 1144 East 79th Street, Cleveland, Ohio 44115. Since on or about March 27, 1975 plaintiff has been totally and permanently disabled. Prior to sustaining his disability, plaintiff was employed by an employer who had executed a collective bargaining agreement with defendant, Commission House Drivers Union Local No. 400 ("Union"). Prior to the onset of his disability, plaintiff had accumulated nineteen (19) years service with employers who had duly executed collective bargaining agreements with the Union or were otherwise subject to the Pension Trust Fund administered by the Union.

3. Defendant, Union, is a labor organization as that term is defined at 29 U.S.C. §152(5). Since on or about September 1, 1961, the Union has established and maintained defendant The Commission House Drivers Local No. 400 Pension Trust ("Trust") for the benefit of certain eligible participants employed by employers subject to making contributions to said pension trust fund. Among the benefits payable to participants covered by the Trust are disability benefits. The Trust is a "Plan" as defined in 29 U.S.C. §1002(3). Defendant, Trustees of the Commission House Drivers Union Local No. 400 Pension Trust ("Trustees") are the individuals entrusted with the power, authority and discretion to administer the Trust established by the Union as aforesaid.

4. On or about the 3rd day of December, 1976, defendants rejected plaintiff's application for payment of benefits due him under the Pension Trust Fund Agree-

ment. In response to plaintiff's application the Union Trust and Trustees have taken the position that plaintiff did not have fifteen (15) years *continuous* credited service and therefore was not eligible for any disability benefits. This action of the Union Trust and Trustees in refusing to honor plaintiff's application and refusing to pay the disability benefits due him under the Pension Fund Trust Agreement is arbitrary and capricious and was taken in bad faith and with a wanton and reckless disregard to the rights of plaintiff under the Pension Fund Trust Agreement.

5. The Pension Fund Trust Agreement does not require that an employee have fifteen (15) years *continuous* credited service as a condition precedent to eligibility for disability benefits. In fact, the Pension Fund Trust Agreement provides, in relevant part:

III. Eligibility for Benefits.

"A participant which has attained his 50th birthday and completed at least 15 years of credited service and who is deemed to have incurred a total and permanent disability, shall be eligible for disability benefits if he has been disabled for a period of six consecutive months and if such disability is established to the satisfaction of the Trustees."

I. Definitions.

"Credited service means the sum of a participant's credits for past service and his credits for future service determined as follows:

(A) For Past Service:

For each year of service prior to September 1, 1961, the participant shall receive

one full year of credit irrespective of the number of hours worked subject to the maximum of ten years.

(B) A participant shall receive a full year of credit for any year of service commencing on or after September 1, 1961 during which contributions were made on his behalf for no less than 1900 hours. Such credit shall be reduced proportionately for any such year in which contributions were made for less than 1900 hours in accordance with the following schedule:

6. Plaintiff qualifies for disability benefits and has been damaged as a result of the actions of defendants as described in this First Claim and is entitled to recovery from them.

SECOND CLAIM

7. Plaintiff hereby realleges Paragraphs 1 through 6 above.

8. Defendants, by virtue of their continuing refusal to honor plaintiff's valid application for disability benefits and pay such benefits to plaintiff, are in breach of the expressed terms of the agreement establishing and controlling the operation of the Pension Trust Fund. Plaintiff is an intended third party beneficiary of that Agreement.

9. By reason of the aforesaid breach of contract committed by defendants, plaintiff has suffered damages and is entitled to recovery.

WHEREFORE, plaintiff requests that:

1. This Honorable Court declare that plaintiff is and has been entitled to disability benefits payable from the

Trust established and administered by the Union and Trustees.

2. This Honorable Court order the Trust and Trustees to pay to plaintiff all disability benefits due him in the future under the Pension Trust Fund Agreement and pay plaintiff all past benefits due him but as yet unpaid, plus interest.

3. This Honorable Court enter judgment in favor of plaintiff against defendants jointly and severally for the costs of this action including reasonable attorney's fees incurred by plaintiff.

4. This Honorable Court grant plaintiff any other relief as may be deemed equitable, just and proper.

/s/ Fred D. Shapiro
Shapiro, Turoff & Gisser
1200 Standard Building
Cleveland, Ohio 44113
Telephone: 241-8080

And

/s/ Alan S. Belkin
Shapiro, Turoff & Gisser
1200 Standard Building
Cleveland, Ohio 44113
Telephone: 241-8080
Attorneys for Plaintiff

ANSWER WITH AFFIRMATIVE DEFENSES
AND INTERROGATORIES ATTACHED

Case No. C78-714

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALEX SWACKARD,
Plaintiff

vs.

COMMISSION HOUSE DRIVERS UNION, LOCAL 400
et al.,
Defendants.

Now comes the Defendants and by way of answer state the following:

1. The Defendants admit that the various sections of the United States Code cited provide for the jurisdiction of civil rights actions generally, but deny that the Plaintiff is entitled to any relief thereunder.

2. Defendants admit that Plaintiff resides at 1144 East 79th Street; Defendants deny for want of knowledge that Plaintiff has been totally and permanently disabled since March 27, 1975 or any time whatsoever; Defendants deny all the remaining allegations contained in paragraph two as though fully rewritten and specifically denied.

3. Defendants admit that it is a labor organization as the term is defined at 29 U.S.C. Section 152 and the remaining allegations of paragraph three of Plaintiff's complaint.

4. Defendants admit that it denied Plaintiff's application as alleged but deny all the remaining allegations of paragraph four as though fully rewritten and specifically denied.

5. Defendants deny paragraph five of Plaintiff's complaint as though fully rewritten and specifically denied and add that Plaintiff has apparently intentionally misstated the information given or available to him in this paragraph.

6. Defendants deny each and every allegation contained in paragraphs seven, eight, and nine of Plaintiff's complaint as though fully rewritten and specifically denied.

7. Further answering Defendants deny, each and every, all and singular, the allegations contained in Plaintiff's complaint not specifically admitted to be true herein.

AFFIRMATIVE DEFENSES

NOW COMES the Defendants, and for its affirmative defenses, states as follows:

1. The Plaintiff has failed to state a claim upon which relief may be granted.

2. The Plaintiff has failed to file timely the within action and therefore his claim is barred by the Statute of Limitations.

3. The Plaintiff has failed to use the available administrative remedies and exhausts same. Therefore, his claim is barred.

4. Defendants believe and therefore aver that Plaintiff has intentionally misquoted the trust agreement in his complaint in an attempt to affirm his untenable position. The trust agreement, a copy of the relevant parts are attached hereto and made a part hereof, specifically sets forth the following definitions.

11. "Service" means continuous employment with one or more employers who satisfy the requirements of eligibility and agree to be bound by the Agreement and Declaration of Trust.

12. "Credited Service" means the sum of Participant's *credits* for past service and his credits for future service determined as follows, etc.

5. Further Defendants say that in addition to the clear language of the trust agreement as set forth above, the trustee of the plan has reaffirmed by resolution that in order to be eligible for disability benefits a member must have fifteen years of *uninterrupted* consecutive service.

WHEREFORE, Defendants pray that Plaintiff's complaint be dismissed and that they go hence without costs.

Geraci & LaPerna Co., L.P.A.
By Rudolph J. Geraci
2020 Carnegie Avenue
Cleveland, Ohio 44115
771-2680
Attorney for Defendants

ARTICLE I

DEFINITION

1. "Employer" means any employer who has duly executed a collective bargaining agreement with the Union, or any employer not presently a party to a collective bargaining agreement, including the Union and the Trustees, who satisfy the requirements for participation and agree to be bound by the Agreement and Declaration of Trust.

2. "Union" means Commission House Drivers Union, Local 400.

3. "Participant" means any person in the employ of an Employer on whose behalf the Employer makes contributions to the Pension Fund.

4. "Trustees" means the Trustees of the Commission House Drivers Union, Local 400, Pension Trust established by an Agreement and Declaration of Trust dated June 7, 1962.

5. "Plan" means the Commission House Drivers Union, Local 400, Pension Plan as described herein and as from time to time hereafter amended.

6. "Pension Fund" means the trust fund administered by the Trustees of the Commission House Drivers Union, Local 400, Pension Trust.

7. "Contract" means the group annuity contract issued to the Trustees by the Insurance Company.

8. "Effective Date" means September 1, 1961.

9. "Insurance Company" means the John Hancock Mutual Life Insurance Company.

10. "Retirement Benefit" means any benefit payable to a Participant upon retirement, as provided herein.

11. "Service" means continuous employment with one or more Employers who satisfy the requirements for eligibility and agree to be bound by the Agreement and Declaration of Trust.

12. "Credited Service" means the sum of a Participant's credits for Past Service and his credits for Future Service determined as follows:

    (a) For Past Service

    For each year of Service prior to September 1, 1961, a Participant shall receive one full year of

credit irrespective of the number of hours worked subject to a maximum of 10 years

(b) For Future Service

A participant shall receive a full year of credit for any year of Service commencing on or after September 1, 1961, during which contributions are made on his behalf for no less than 1900 hours. Such credit shall be reduced proportionately for any such year in which contributions are made for less than 1900 hours in accordance with the following schedule:

Hours Worked	Credit
1900 hours	1 full year
1425-1899	3/4 year
950-1424	1/2 year
475-949	1/4 year
Less than 475	None

Service Accumulation

At a participant's retirement date, Service credits may be determined by accumulating the total number of hours of Service and then dividing this total by the total years of Service. If the result is 1,900 or more, full credit is given for each year of service, up to a maximum of ten years.

Proportional reduction in credit occurs if the average is less than 1900. By this method, a participant may store up extra hours (over 1,900) for years in which he may not acquire 1,900 hours.

AMENDMENT TO BE ATTACHED TO AND MADE A PART OF THE LOCAL 400 FOOD TERMINAL EMPLOYEES PENSION PLAN

It is understood and agreed that, effective March 1, 1964, the following modifications and alterations are hereby made in this Plan:

1. Article I. Definitions: The following defintions are added to this Article:

   "12. 'Disability Benefit' means the benefit which may be payable to a Participant who has a Total and Permanent Disability as provided herein.

   13. 'Total and Permanent Disability' means a disability by which a Participant is presumed, upon examination by a licensed medical doctor selected by the Trustees, or upon the granting of a disability pension award by the Federal Social Security Administration if the Trustees so desire, to be wholly and permanently prevented from engaging in any occupation or employment for wage or profit during the remainder of his life, as a result of bodily injury or disease, either occupational or non-occupational in cause, but excluding disability incurred while in the service in the Armed Forces of any country and excluding also disabilities which extend from chronic alcoholism or addiction to narcotics or disability caused by such Participant's engagement in a felonious act."

2. Article III. Eligibility for Benefits. The following section is added to the end of and made a part of this Article:

   "(3) Disability Benefit:

   A Participant who has both attained his fiftieth birthday and completed at least fifteen years of

Credited Service, and who is deemed to have incurred a Total and Permanent Disability, shall be eligible for a Disability Benefit if he has been disabled for a period of six consecutive months and if such disability is established to the satisfaction of the Trustees."

3. Article IV. Should be amended to read:

"AMOUNT OF BENEFIT

(1) Annual Amount of Retirement Benefit:

(a) For a Participant with 10 or more years of Credited Service on his retirement date, $840.

(b) For a Participant with less than 10 years of Credited Service on his retirement date, $84.00 multiplied by the number of years of his Credited Service up to a maximum of 10 such years of Credited Service.

(c) For a disabled Participant upon attaining his retirement date, an amount equal to the yearly Disability Annuity benefit he has been receiving.

JUDGMENT

Civil Action File No. C 78-714

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

ALEX SWACKARD

VS.

COMMISSION HOUSE DRIVERS UNION LOCAL NO. 400, *et al.*

This action came on for trial (hearing) before the Court, Honorable William K. Thomas, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered, in favor of the plaintiff.

It is Ordered and Adjudged that the plaintiff has met the disability benefit eligibility requirements as stated in the court's oral opinion rendered on October 25, 1979.

IT IS FURTHER ORDERED that the court's oral opinion is hereby adopted as findings of fact and conclusions of law, in accordance with Rule 52, Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that Alex Swackard upon showing as required under the provisions of the Plan in effect on August 12, 1976, that he, Alex Swackard, was totally and permanently disabled on or prior to August 12, 1976, that he, Alex Swackard, is declared to be entitled to payment to him of all Disability Benefits, past, present and future, which he would have received had the erroneous August 12, 1976, determination by the Trustees not been made.

Dated at Cleveland, Ohio, this 10th day of December, 1979.

/s/ William K. Thomas
U.S.D.C. Judge

NOTICE OF APPEAL

Case No. C78-714

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALEX SWACKARD,
Plaintiff,

vs.

COMMISSION HOUSE DRIVERS UNION, LOCAL 400, *et al.*,
Defendants.

Defendant does hereby give notice of his appeal to the Sixth Circuit Court of Appeals from the decision rendered in the Federal District Court herein on the 25th day of October, 1979.

The transcript of said proceedings have been ordered on November 20, 1979.

/s/ R. J. Geraci
Geraci & LaPerna Co., L. P. A.
2020 Carnegie Avenue
Cleveland, Ohio 44115
771-2680
Attorney for Defendant

SERVICE

A copy of the foregoing Notice of Appeal was mailed to Fred D. Shapiro and Mr. Alan S. Belkin, Attorneys for Plaintiff, 1200 Standard Building, Cleveland, Ohio 44113, on this 20 day of November, 1979.

/s/ R. J. Geraci
Geraci & LaPerna Co., L. P. A.
2020 Carnegie Avenue
Cleveland, Ohio 44115
771-2680
Attorney for Defendant

STIPULATIONS

Case No. C78-714

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT TO OHIO
EASTERN DIVISION

ALEX SWACKARD,
Plaintiff

vs.

COMMISSION HOUSE DRIVERS UNION, LOCAL NO. 400, *et al.*,
Defendants

It is hereby stipulated by and between the parties to this case that:

1. The Commission House Drivers Union Local 400 Pension Plan is an employee benefit plan as such term is

defined in Section 3 (3) of the Employee Retirement Income Security Act of 1974 ("ERISA").

2. In March, 1964 The Commission House Drivers Union Local 400 Pension Plan added a disability benefit program for their participants in addition to the regular pension plan. (A copy of the terms and provisions of this disability benefit program and relevant definitions are attached hereto as Exhibits A1, A2, and A3.)

3. Alex Swackard was employed by Taylor Produce Company from 1953 to 1962 and also worked continuously for John Miceli from 1965 to March 1975. Both Taylor Produce Company and John Miceli were, during the entire periods Alex Swackard was employed by them, participants in The Commission House Drivers Union Local 400 Pension Plan and contributed to that plan on Alex Swackard's behalf during the full period that he was employed by them.

4. Alex Swackard was not employed with a participating employer during the period of 1962 through 1965.

5. Alex Swackard is entitled to vested pension rights as provided by ERISA and The Commission House Drivers Union Local 400 Pension Plan. Alex Swackard is presently 54 years of age (date of birth 8/10/25) but has not as yet reached the normal retirement age required by The Commission House Drivers Union Local 400 Pension Plan and ERISA.

6. Alex Swackard did apply for disability benefits under The Commission House Drivers Union Local 400 Pension Plan sometime prior to August 12, 1976 and his application was denied for the reasons set forth in the letter

of Victor A. Albanese dated December 3, 1976 and attached hereto as Exhibit B.

/s/ Alan Belkin
Shapiro, Turoff & Gisser
1200 Standard Building
Cleveland, Ohio 44113
Telephone: 241-8080
Attorney for Plaintiff

/s/ Rudolph Geraci/AB
per authorization
2020 Carnegie Avenue
Cleveland, Ohio 44115
Telephone: 696-2268
Attorney for Defendant

Printer's Note: Exhibits A1, A2 and A3 consist of the Amendment to be Attached to and Made a Part of the Local 400 Food Terminal Employees Pension Plan and Relevant Definitions which has been previously printed at pages A39-A43 and omitted here to avoid duplication.

EXHIBIT B

COMMISSION HOUSE DRIVERS AND EMPLOYEES
UNION LOCAL 400 WELFARE AND PENSION FUNDS
Charles Cimino, *Chairman of the Board of Trustees*
Administrative Office: 2191 East 19th Street,
Cleveland, Ohio 44115
Phone: 216/687-1144

December 3, 1976

Mr. Alex Swackard,
3005 East 130 St.
Cleveland, Ohio 44120

Dear Mr. Swackard,

This letter is to advise you that your request for a disability pension under the Local 400 Pension Plan was

discussed by the Board of Trustees of the Fund at their meeting on August 12, 1976. The operation of this Pension Fund is governed by the Board of Trustees, and they are the final authority with regard to any decisions that must be made concerning the Fund operation.

You have previously raised a question as to whether or not you are eligible for a disability pension under the rules of the Fund. The record indicated that you had 9 years of service between 1953 and 1962 and 10 years of service from 1965 to 1975. One of the requirements for eligibility for a disability pension is to have fifteen years of service. Although you had 19 years of service, they were not consecutive years of service because of the break in membership between 1962 and 1965.

At the August 12th meeting, the Board was asked to establish if the rule required that the 15 years must be consecutive years or not. The Board members discussed the question at some length. It was the unanimous decision of the Board to re-affirm that the original intent of the rule was that the 15 years must be consecutively worked in order for a member to be eligible for a disability pension. Furthermore, the Board decided that this rule would continue to be unchanged for the present and the future.

Therefore, based on this ruling by the Board of Trustees, I must inform you that you cannot qualify for any disability pension benefits from the Local 400 Pension Fund. This decision is in keeping with all past precedents already established in this particular matter.

If you have any questions on this matter, feel free to communicate with this office.

Sincerely,

/s/ Victor A. Albanese
Victor A. Albanese,
Fund Co-Administrator

TRANSCRIPT OF PROCEEDINGS

[2] The Court: Good morning.

Mr. Belkin: Good morning, your Honor.

Mr. Geraci: Good morning.

The Court: Do I understand there are some witnesses in addition to the stipulation?

Mr. Belkin: Plaintiff has none, your Honor.

The Court: What about the Defendant?

Mr. Geraci: None, your Honor.

I think we are agreed that the Exhibits that have been attached to the stipulation are agreed to be true and all parts thereof, including the letter of Mr. Albanese's. So all the statements that are being made in that letter are agreed to be true. And if that is the case, then I have no witnesses either.

The Court: Well, [3] I don't know whether the history in this plan is relevant or not.

I would like to ask, though, whether there is any history of handling claims in connection with this fund that at all bears on the interpretation and application of the language that is relevant here.

Mr. Geraci: For that purpose, your Honor, if you would like, I could call witnesses to present testimony.

The Court: Well, I am merely asking the question, whether or not that would provide information or not?

Mr. Belkin: Well, from Plaintiff's perspective, were there a witness called to testify to the history of the plan, I would object on the grounds of relevancy.

I think that the language of the plan is before you; Mr. Swackard's personal circumstances are before you; and it then becomes a question of applying the facts to

what I think is clear language of the plan. And I don't think the fact that it was done the same way even a hundred times in the past [4] necessarily means that it was justified here, because Mr. Swackard is the one who has now come forward to challenge it.

Mr. Geraci: I would disagree with counsel's reasoning, but I believe the letter does in fact affirm the fact that this matter has been brought up prior to this time; and in the letter of Mr. Albanese, he stated that the Board reaffirmed that the original intent of the Rule was that the fifteen years must be consecutively worked.

So with that in mind, your Honor—

The Court: Well, it was partly that language that prompted my question as to what the meaning of that sentence is. "The original intent," or "Original," would suggest going back to the origin of the plan. I don't know what that means.

Mr. Geraci: Well, I believe that my interpretation of it would be that—

The Court: Well, it wouldn't be a question of your interpretation.

[5] Mr. Geraci: Okay.

The Court: It would be a question of whether or not evidence is permissible to explain that document. That is really the question.

Mr. Belkin: Well, in addition to relevancy, I think there is a parol evidence question. I think that the—at least to my reading—the document is clear on its face. And that is going to be the basis of my argument.

The Court: I see.

Mr. Belkin: And the basis of my position.

The Court: Well, I will bow to the consummate wisdom of counsel, and not press the point. We will take the record as it is, barring any unforeseen consequences.

I would like to, therefore, proceed to receive oral argument, counsel, on this matter, if you are prepared to present oral argument.

Mr. Belkin: I am.

PLAINTIFF'S MOTION FOR DETERMINATION OF ATTORNEYS' FEES

Case No. 78-714

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALEX SWACKARD,
Plaintiff

vs.

COMMISSION HOUSE DRIVERS UNION LOCAL NO. 400, *et al.*,
Defendants

Plaintiff moves this Honorable Court for an order determining the amount of attorneys' fees which are to be paid to plaintiff from defendants in accordance with the decision of this Court reached after trial on this case on October 25, 1979. Plaintiff states in support of this motion that the Court stated that the parties were to try and agree as to the amount of attorneys' fees to be awarded plaintiff and if no such agreement could be reached the Court would make the appropriate determination upon submission of evidence. Plaintiff's counsel represent that in discussions with counsel for defendants no such agreement could be reached. Attached to this motion is the affidavit of Fred D. Shapiro and Alan Belkin as well as an itemized statement of the time expended in

the preparation and prosecution of this matter. Plaintiff respectfully requests that, based on this evidence, the Court entered an order specifying the total amount of attorneys' fees to be included in the judgment for plaintiff to be entered in this case.

ALAN S. BELKIN
SHAPIRO, TUROFF & GISSER
1200 Standard Building
Cleveland, Ohio 44113
Telephone: 241-8080
Attorney for Plaintiff

CERTIFICATE OF SERVICE

A copy of the foregoing Plaintiff's Motion for Determination of Attorneys' Fees was mailed, on the 1st day of November, 1979, to Rudolph Geraci, Attorney for defendant, 2020 Carnegie Avenue, Cleveland, Ohio 44115.

ALAN BELKIN
SHAPIRO, TUROFF & GISSER
Attorney for Plaintiff

AFFIDAVIT

STATE OF OHIO)
) ss.
COUNTY OF CUYAHOGA)

FRED D. SHAPIRO and ALAN BELKIN do, upon their oath, depose and state:

1. They are both attorneys duly licensed to practice law in the State of Ohio. Both are employed by FRED D. SHAPIRO CO., L.P.A.

2. In or about January, 1977 Alex Swackard retained FRED D. SHAPIRO CO., L.P.A., to represent him with regard to his claim for disability benefits alleged to be due him from the Commission House Drivers Union Local

No. 400 Pension Trust ("Trust"). Pursuant to this representation both FRED D. SHAPIRO and ALAN BELKIN performed services on Alex Swackard's behalf up to and including trial of this matter before the United States District Court for the Northern District of Ohio.

3. Attached to this affidavit as Exhibit A is an itemization of all services performed for Alex Swackard with reference to this case by FRED D. SHAPIRO and ALAN BELKIN. This itemization has been compiled through a review of time records kept pursuant to this representation, review of documents in the file pertaining to this case and recollection of the attorney performing the specific service for Mr. Swackard.

4. The trial court's decision in Mr. Swackard's favor may potentially result in Mr. Swackard's receipt of in excess of Fifteen Thousand Dollars ($15,000.00) in benefits which had previously been denied him by the Trust and which, but for the representation he received from FRED D. SHAPIRO CO., L.P.A., he would not have obtained.

Further Affiant Sayeth Naught

Fred D. Shapiro Co., L.P.A.
1200 Standard Building
Cleveland, Ohio 44113
Telephone: 241-8080

/s/ Fred D. Shapiro
/s/ Alan Belkin

SWORN TO BEFORE ME and subcribed in my presence this 1st day of November, 1979.

/s/ Daniel C. Turoff
Notary Public
DANIEL C. TUROFF, Attorney
Notary Public - State of Ohio

My commission has no expiration date.
Section 147.03 R.C.

EXHIBIT A

ITEMIZATION

SWACKARD v. COMMISSION HOUSE DRIVERS UNION LOCAL 400 PENSION TRUST

1/24/77	Initial conference with Alex Swackard	1.75 hours
Jan. '77 to Aug. '77	Checking facts of Alex Swackard's contentions including calls to Mr. Cimino, former employees, medical correspondence and conferences with Mr. Swackard	3.50
8/31/79	Letters to Mr. Swackard & Victor Albanese	.50
9/30/77	Received & reviewed letter from R. Geraci	.25
10/11/77	Letter to R. Geraci	.25
1/17/78	Research re: Daniel case; letter to atty. Youngwirth	.75
6/16/78	Research jurisdictional question; drafted complaint and supporting papers	2.00
6/20/78	Corrected, proofread and filed complaint in Federal Court; letter to A. Swackard	1.50
6/23/78	Received and reviewed court's initial order	.25
6/29/78	First draft of interrogatories to defendant	1.25
7/1/78	Received & reviewed answer and interrogatories of defendant	.50

7/6/79	Revised amended complaint; drafted motion and memorandum in support of motion to amend; conferred with Fred D. Shapiro	1.00
7/24/78	Completed drafting of first set of interrogatories and filed same	.75
7/25/78	Began draft of answers to defendant's interrogatories	.75
7/27/78	Letter to Mr. Swackard	.25
8/10/78	Preparation for and attendance with A. Swackard at deposition	3.25
8/11/78	Completed and filed answers to defendant's interrogatories	.75
8/15/78	Letter to A. Swackard	.25
8/16/78	Letter to J.F. Sanson Co. re: employment of A. Swackard	.25
8/21/78	Call from atty. Joel Newman re: letter to J.F. Sanson Company	.25
9/11/78	Letter to Atty. R. Geraci	.25
10/11/78	Received and reviewed defendant's answers to interrogatories	.75
11/13/78	Letter to Social Security Administration	.25
12/8/78	Letter to Atty. R. Geraci requesting full text of pension plan; reviewed file; completed rough draft of summary judgment memorandum	2.00
12/9/78	Letter to Social Security re: Swackard disability file	.25
7/6/79	Prepared pre-trial order; call from atty. R. Geraci; attended pre-trial before Judge Thomas	1.50

7/9/79	Letter to atty. R. Geraci re: proposed stipulations	.50
8/6/79	Letter to atty. R. Geraci	.25
10/15/79	Letter to A. Swackard; letter to R. Geraci	.50
10/18/79	Met with atty. R. Geraci re: stipulations	.75
10/19/79	Redictated stipulations as agreed to	.25
10/25/79	Prepared for and attended trial; prepared and revised judgment order	6.00
10/29/79	Reviewed and signed final copy of judgment order; letter to R. Geraci	.25
	TOTAL	33.50 hours

ORDER

Civil Action Number C78-714

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALEX SWACKARD,
Plaintiff,

vs

COMMISSION HOUSE DRIVERS UNION, LOCAL NO. 400, *et al.*,
Defendants.

This matter having come on for hearing on plaintiff's motion for determination of attorneys' fees and the court having considered the testimony and evidence presented

determines that plaintiff's counsel has reasonably expended 33.50 hours of service and that a reasonable hourly rate is $75.00 per hour. The court adopts the findings and conclusions of its oral opinion in support of these conclusions. IT IS SO ORDERED.

/s/ William K. Thomas
U.S.D.C. Judge

Opposition

Office - Supreme Court, U.S.
FILED
OCT 19 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-567

Supreme Court of the United States

October Term, 1981

COMMISSION HOUSE DRIVERS UNION LOCAL NO. 400, TRUSTEES OF THE COMMISSION HOUSE DRIVERS UNION LOCAL NO. 400 PENSION TRUST,
Petitioners,

vs.

ALEX SWACKARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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(216) 241-8080
Counsel for Respondent

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTION PRESENTED

Whether a Writ of Certiorari to the Sixth Circuit Court of Appeals is appropriate where both the trial court and appellate court found that the trustees of a pension fund improperly interpreted the plan documents in ruling that Respondent was not eligible for disability retirement benefits.

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Appendix:

Oral Opinion of the United States District Court A1

TABLE OF AUTHORITIES

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Statutes

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Employee Retirement Income Security Act of 1974 (ERISA):

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29 U.S.C. §1001 4
29 U.S.C. §1104 4
29 U.S.C. §1104(a)(1) 2
29 U.S.C. §1132 2

No. 81-567

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

In the trial court Judge William K. Thomas rendered his decision and opinion orally. Since Petitioners failed to attach Judge Thomas' opinion to their Petition a copy of that opinion is attached hereto as Appendix A. The written, unpublished opinion of the Sixth Circuit Court of Appeals does appear in the Petition's Appendix at pages A1-A3.

JURISDICTION

Petitioners allege that its Petition should be granted pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Petitioners contend that the primary statute involved is Section 301 of the National Labor Relations Act (29 U.S.C. §185). This statute is reprinted at pages A7-A8 of the Petition. Respondent believes that the most relevant statute is Employee Retirement Income Security Act of 1974 ("ERISA") (29 U.S.C. §1104(a)(1)). Petitioners do not recite this statute which provides:

> (a)(1) Subject to sections 403(c) and (d) [29 U.S.C. 1103(c) and (d)] 4042 [29 U.S.C. § 1342], and 4044 [29 U.S.C. § 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> * * * * *
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title

Finally ERISA §502 (29 U.S.C. §1132) is also involved. This statute is reproduced in the Petition at pages A14-A19.

STATEMENT OF THE CASE

Respondent, Alex Swackard ("Respondent") worked for many years in the fruit and produce industry in Cleveland. Among his employers were Taylor Produce Company (1953-1962) and John Miceli (1965-1975). Both of these employers were covered by union contracts and contributed to Petitioner, Commission House Drivers Union Local No. 400 Pension Trust ("Pensioner Fund"), on Respondent's behalf.

Sometime prior to August 12, 1976 Respondent applied for disability retirement benefits to which he was allegedly entitled from the Trust. At this time, Swackard, who was born on August 10, 1925, was well over the age threshold of 45 years. Swackard alleged a total disability but officials of the Pension Trust never considered this issue. Instead, the Pension Trust, through its co-administrator, notified Swackard that he was not even eligible for benefits. Although the co-administrator acknowledged that Swackard had nineteen (19) years of credited service, he asserted that at least fifteen (15) of these nineteen (19) years must be consecutive. Swackard did not have fifteen (15) consecutive years of service.

Swackard then filed his action with the lower court which proceeded to trial before Judge William K. Thomas on October 25, 1979. On December 10, 1979, Judge Thomas entered Judgment in favor of Swackard. This Judgment, which was based on oral opinion delivered on October 25, 1979, declared that the trustees erred in requiring fifteen (15) consecutive years, and that Swackard was eligible for consideration for disability benefits from the Pension Trust.

After the entry of Judgment in his favor, Swackard, through his counsel, moved for an order determining the attorney fees which Judge Thomas' oral opinion had granted.

On February 8, 1980, the court made and filed its determination as to attorney fees. By an order dated May 11, 1981 the Court of Appeals affirmed and on June 22, 1981 the Court of Appeals denied a request for rehearing.

ARGUMENT

A. The Plan Trustees, Being Bound by the Terms and Conditions of the Plan Documents Do Not Have the Extensive Discretion Promoted by Petitioners.

It is somewhat incredible that at this stage of litigation begun in 1978 and processed to final judgment in both the trial and appellate courts, Petitioners have so little grasp of the nature of the action itself or the decisions rendered below. In the opening sentence of their argument Petitioners contend that this action was brought pursuant to Section 301 of the National Labor Relations Act. At every stage of this litigation Respondent has asserted that the jurisdictional base for this suit is the Employee Retirement Income Security Act of 1974 ("ERISA") 29 U.S.C. §1001 et seq.

Not surprisingly, in light of their absolute inability to recognize the statutory base, Petitioners proffer a fiduciary standard at odds with the specific sections of ERISA on that subject. Not once in their argument do Petitioners so much as acknowledge the language of ERISA §404 (29 U.S.C. §1104), *supra* which obligates the fiduciary to administer the fund:

> "In accordance with the documents and instruments governing the plan insofar as such documents are consistent with the provisions of this title."

Stripped to the basics Petitioners contend regarding fiduciary discretion that the trustees may ignore the written plan documents in reaching decisions.

If such untrammeled discretion were ever permitted—which is doubtful—it is certainly banned by the provisions of ERISA. Although Petitioners append the trial court's judgment entry to their petition they fail to include Judge Thomas' oral opinion upon which that entry was based. In that opinion—the text of which is attached as Appendix A to this response—Judge Thomas carefully considers and properly disposes of Petitioners' misconceived notion of fiduciary discretion.

In considering the evidence before him which included the text of the plan and the minutes of the trustees' meeting at which Respondent's application for disability benefits was considered, and rejected, Judge Thomas found and held:

> "Undoubtedly, the Trustees, in the administration of this pension plan, have the authority to reasonably construe the language of the various provisions. The Trustees determined that this plan is silent on the question of whether the years have to be consecutive, now that must be understood to mean that the Trustees did not believe that Paragraph 11 applied
>
> * * * * *
>
> So, as of August 12th [the date on which Respondent's application was considered and denied], the plan being silent, as the Trustees said, on whether consecutive employment was required, the Trustees did not attempt to amend the plan in accordance with the pro-

> visions of the plan. They rather, just on their own, decided to write into the plan this provision about consecutive employment, or this construction of consecutive employment."

Petitioners' refusal to address these findings by Judge Thomas is understandable. Clearly, recognition that participants obtain certain rights by virtue of the terms and provisions of the plan unnecessarily clutters up Petitioners' imagined world of the absolute discretion of the trustees.

The list of cases cited by Petitioners at page 5 of the Petition do not support the type of discretionary power advanced in the Petition. These cases, indeed, serve to buttress the ruling and reasoning of the Trial Judge. With the exception of *Kosty v. Lewis*, 319 F.2d 744 (D.C. Cir. 1963) these decisions involve situations where the Trustees were interpreting portions of the written plan documents. Judge Thomas recognized that not interpretation, but amendment, was present in the rejection of Respondent's application for benefits. This distinction between construction of and revision of plan documents, ignored by Petitioners, vitiates their contentions regarding trustees' discretion. The failure of Petitioners' position is magnified by the *Kosty* case cited by them. In *Kosty* the court found for the applicant for benefits. Its decision was predicated on a recognition that the trustees' decision diverged from the terms of plan and adopted additional requirements for eligibility. Kosty was found eligible for benefits because the trustees were denied ad hoc amendatory power.

As annoying as Petitioners' refusal (or inability), even at this stage of litigation, to recognize the legal principles on which the lower courts made their decisions, is, it is minor compared with the dismay occasioned by the cavalier way in which Petitioners misstate crucial facts. At page 7 of the Petition there is an allusion to a letter by the co-

administrator to Respondent explaining the basis for rejecting Respondent's application for benefits. Petitioners state that this letter was part of the trial court record (which is true) and go on to claim:

> "... all the statements made therein [the co-administrator's letter] were stipulated to be true as part thereof and agreed prior to argument before the trial court ..."

To state or even intimate that Respondent acknowledged the accuracy of the co-administrator's reasoning in denying Respondent's claim is preposterous. Once more Petitioners make manifest their slipshod approach to this case. The stipulation (Appendix 6, of Petition pp. A48, A49) in fact states:

> "b. Alex Swackard did apply for disability benefits under the Commission House Drivers Union Local 400 Pension Plan sometime prior to August 12, 1976 and his application was denied for the reasons set forth in the letter of Victor A. Albanese dated December 3, 1976 and attached hereto as Exhibit B."

Obviously nothing in that stipulation indicates any assent by Respondent to the validity of any portion of the Albanese letter.

When the record is considered realistically and in the proper factual and legal context, the correctness of Judge Thomas' decision and opinion is clear. Petitioners' poorly developed incomplete argument in favor of unbridled fiduciary discretion does not justify the granting of this Petition.

B. The Court of Appeals Adopted, in Full, the Valid Reasoning of the Trial Court Judge.

In discussing the opinion and decision rendered by the Sixth Circuit Court of Appeals Petitioners contend that

Judge Thomas' theory of the case was rejected and a "break in service" rule was substituted. Even a cursory review of the Circuit Court opinion shows no such substitution. Petitioners' arguments reflect at best, a marked inability to interpret plain English. To analyze Petitioners' position vis-a-vis the appellate opinion here, reference must first be made to relevant portions of Judge Thomas' opinion again conveniently ignored by Petitioners.

After making the findings recited earlier in this brief (*supra* pp. 5-6) Judge Thomas found:

> "The difficulty with their [the Trustees'] approach was, that as of that moment, the plan being silent on this point, his [Respondent's] rights had already accrued. Therefore, for them to determine that he was to have 15 consecutive years, they retroactively were depriving of rights they gave him, under their own construction that the plan was silent on this point.
>
> Nothing could be clearer than the fact that Trustees may not retroactively deprive a person of a vested right. Now, this was true, certainly, before ERISA. It is doubly true under ERISA."

In affirming Judge Thomas' decision, the appellate panel commented on the trial court's reasoning thusly:

> "The court concluded from this that the Trustees determined that the plan was silent on the question whether the fifteen years of service had to be consecutive. It reasoned that by denying Swackard's application, the trustees effectively inserted a new rule into the plan, and by doing so retroactively deprived Swackard of a vested right in violation of ERISA.
>
> *We agree.* In light of the trustees' conclusion that the plan was silent as to the necessity of fifteen consecu-

> tive years of employment, their denial of benefits in this case amounts to a retroactive application of a 'break in service' rule."

To argue that there has been a major change in reasoning by the Appellate Court is totally unjustified. Being based on such a faulty premise, Petitioners' purported distinguishing of the cases cited by the Appellate Court is not credible. Likewise Petitioners' contention that there is conflict among circuits over the issues of this case cannot be supported.

C. No Exhaustion of Administrative Remedies Was Required of Respondent.

Petitioners' claim that administrative remedies must be pursued before suit is also infected by the inability of Petitioners to see the ERISA basis of this suit. All of Petitioners' arguments in this regard (Petition pp. 11-14) are founded on legal principles expressly related to Section 301 of the National Labor Relations Act. Further, the appeals provision of the plan itself is not mandatory. Both the trial judge and the Appellate Court properly ruled that this case might go forward.

D. ERISA Section 502(g) Explicitly Allows the Granting of Attorney Fees to Respondent.

At several junctures Respondent has pointed up Petitioners' refusal to acknowledge the plain meaning of the opinions, statutes, and documents attendant to this case. Yet nowhere is this unfortunate circumstance more glaring than in the attack on Judge Thomas' order granting legal fees (Petition 14-15). Here Petitioners state:

> "So too, in the instant case, the award of attorney's fees by the Trial Court, *absent statutory authorization,* is an award which flouts the intent of Congress with respect to this matter." (Emphasis added.)

"Absent statutory authorization," indeed! Petitioners themselves have included the precise statutory authorization for the grant of attorney's fees as part of Appendix D to their Petition. Among the statutes quoted in that Appendix is ERISA Section 502 (29 U.S.C. §532) (Petition A14-A19). At the top of page A18 of the Petition is the bold-faced heading "Attorney's fees and costs." Below the heading is ERISA § 502(g) which provides:

> "In any action under this subchapter by a participant beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party."

Judge Thomas unequivocally had the discretion to enter his order granting Respondent attorney fees (Petition A57-A58).

E. This Case Does Not Present Any Matters of Great Public Interest.

Finally Petitioners plead that, somehow, this case of contract interpretation under an individual set of facts, is a matter of great public interest. Petitioners have presented not an argument but a diatribe. This shrill indictment of the trial court judge need not be dignified with a point by point rebuttal. It is sufficient to say that it is doubtful that even Congressman Ashbrook would see the determination that, under the terms of one pension plan viewed in isolation, one participant is eligible for benefits as a frontal attack on the Constitutional structure of the United States. This is a narrow case involving no far-reaching decisions. Beyond the parties involved this case is not of great interest to the general public.

CONCLUSION

For the myriad of reasons set forth above this Petition should be denied.

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Counsel for Respondent

APPENDIX A

ORAL OPINION OF THE UNITED STATES DISTRICT COURT

[54] THE COURT: It is evident that, if this Court is to decide the case upon the language of Article III, Section (3), Disability Benefit, that Mr. Swackard must prevail. That Section reads, "Disability Benefit. A participant who has both attained his 50th birthday and completed at least 15 years of credited service, and who is deemed to have incurred a total and permanent disability, shall be eligible for a disability benefit if he has been disabled for a period of 6 consecutive months and if such disability is established to the satisfaction of the Trustees."

Now, I appreciate that there still remains for apparent consideration between the parties whether he physically satisfies the latter requirement of this section. However, it is clear that he has attained his 50th birthday—his birthday being August 10th, 1925; and obviously, he had achieved [55] that two days before the—no. The meeting occurred in '76?

MR. BELKIN: Yes, sir.

THE COURT: He was 51 at the time the Trustees considered his application. So that he clearly had achieved 50 years at the time.

He asserts that he became disabled, at least as of August 10, 1975.

MR. BELKIN: Your Honor, I don't wish to interrupt you, but I think there was an amendment admitted around 1971 which lowered the age to 45.

THE COURT: Exactly. We had that earlier.

So in any event, then, under that amendment, as of March 27, 1975, he had satisfied the age requirement—thank you, Mr. Belkin. And on the face of the provision, he had completed 15 years of credited service.

Under 12, he had sufficient service, prior to September 1, 1961, together with his service after 1961, to more than total 15 years, as defined in paragraph 12.

The Trustees, in their meeting of [56] August the 12th, 1976, took up Mr. Swackard's application.

MR. GERACI: That was one of others, your Honor.

THE COURT: Excuse me?

MR. GERACI: It was one of others. It was Mr. Swackard's application, along with others.

THE COURT: Oh, I realize that.

MR. GERACI: Okay.

THE COURT: But they certainly took his application.

MR. GERACI: Oh, yes.

THE COURT: There is no question about that.

I'm sure there were several different matters that they considered, according to paragraph 9 of their minutes.

But with reference to Mr. Swackard's application, there appears this language: "In the case of eligibility for a disability pension, there is a requirement for 15 years of service; but the plan is silent as to [57] whether or not these 15 years must be consecutive."

Undoubtedly, the Trustees, in the administration of this pension plan, have the authority to reasonably construe the language of the various provisions. The Trustees determined that this plan is silent on the question of whether the years have to be consecutive. Now, that must be un-

derstood to mean that the Trustees did not believe that paragraph 11 applied.

I don't know myself just how 11 was used before it was eventually eliminated. All I know is it was part of the original set of definitions. So one may assume that it was probably used in connection with retirement benefits.

Then along came disability benefits, and for some reason they did not, apparently—according to what the Trustees decided—determine this question of whether the employment had to be consecutive, if indeed he had covered employment with more than one employer.

So, as of August 12th, the plan being [58] silent, as the Trustees said, on whether consecutive employment was required, the Trustees did not attempt to amend the plan in accordance with the provisions of the plan. They rather, just on their own, decided to write into the plan this provision about consecutive employment, or this construction of consecutive employment.

The difficulty with their approach was that as of that moment, the plan being silent on this point, his rights had already accrued. Therefore, for them to determine that he was to have 15 consecutive years, they retroactively were depriving him of rights they gave him, under their own construction that the plan was silent on this point.

Nothing could be clearer than the fact that Trustees may not retroactively deprive a person of a vested right. Now, this was true, certainly, before ERISA. It is doubly true under ERISA.

And I think that the later action of the Trustees, in approving a new set of rules and regulations that now clearly spell out, [59] with reference to disability benefits, that a participant must have, in effect, "pension credits

for at least 15 consecutive years at the time this total disability commences."

Now then, by doing this, they are, in effect, inserting into the plan what was not there before.

It is quite apparent, also, that they here treat disability pensions as different from retirement plans; because also in this new plan, there may be breaks in service—now, it is true they may be limited breaks—but in reference to this disability pension, they are saying, "He must have consecutive service."

That is all right. But it may only have a prospective operation, and not a retroactive operation. Clearly, under ERISA, it would not be permitted. And therefore, the value and effect of the plan is to assist the Court in indeed determining a proper construction of the plan as it existed on August 12, 1976, when Mr. Swackard was denied the pension.

Accordingly, upon the entire record, **[60]** I determine that the—laying aside for the moment whether he physically is entitled to recover—he meets the requirements of the pension plan as it then existed, giving full construction and reasonable construction to its various terms.

Now, I don't know where we go from here, in terms of his disability, whether that is something that can be agreed on or not. Can you tell me where we stand on that, counsel?

MR. BELKIN: If your Honor please, can I make the assumption that, as far as the determination of disability, the plan in effect as of August 12, 1976, would govern?

THE COURT: I don't understand what you are saying.

MR. BELKIN: I haven't looked at the new plan as to the definition of total and permanent disability, as compared to the old plan. The old plan said "Total and permanent disability" means a disability by which a participant is presumed, upon examination by a licensed medical doctor [61] selected by the Trustees, or upon the granting of a disability pension award by the Federal Social Security Administration of the Trustees so desire, to be wholely and permanently prevented from engaging in any occupation"—and so forth.

The reason I bring that up is, I don't know how the Trustees will react; but I do have copies of Mr. Swackard's Social Security award certificate, dated 6-17-75; date of entitlement, 10-75, which I will deliver to Mr. Geraci. Which may, in the Trustees' discretion, I think, be determinative in the question of disability.

MR. GERACI: On the question of actual disability, we haven't had an opportunity to review Mr. Swackard's medical records, and we haven't had him examined by a doctor, so I can't very well make a commitment.

THE COURT: How much time do you need to do that, Mr. Geraci?

MR. GERACI: Well, he is going to have to submit the records, which will probably be submitted to the Trustees.

[62] The Trustees may like to have him examined by a doctor. It could take, your Honor, a few months.

THE COURT: Well, that is hardly an issue before this Court, is it?

MR. GERACI: No, it is not, your Honor.

MR. BELKIN: The only reason I raise it, is just for purposes of construction. I think the Court, as I interpret its order, has said that Mr. Swackard's eligibility for disability

benefits is to be considered by the plan in effect on August 12th.

THE COURT: That is correct.

MR. BELKIN: So I am also assuming that the definition of disability would be the one that was in effect on August 12, 1976.

THE COURT: Certainly that would be correct, that the disability definition then in effect would apply.

Now, as to what happens in the future, [63] I don't know.

MR. GERACI: As of right now, as the Court indicates, this isn't an issue that has been presented; because as of today, we have never received or considered Mr. Swackard's application for disability, because we refused to accept it on the basis of the 15 years continuous service.

THE COURT: Yes. Now, what kind of an order would go on?

We don't have to await the other part of it, do we?

MR. GERACI: No.

MR. BELKIN: Your Honor, I think simply declaration under Section 2201, declaring Mr. Swackard to have met all of the eligibility conditions—

MR. GERACI: As far as service is concerned.

MR. BELKIN: Right. And that subject to—

THE COURT: Well, I suggest that you draw up an order and submit it to Mr. Geraci.

[64] Now, insofar as attorney fees are concerned, there is no question that, under ERISA, in bringing of an action of this type, attorney fees may be awarded. Obviously,

they have to be reasonable, and we can hold a hearing on them if necessary, or perhaps the parties can agree on a reasonable fee and include that in the order, if you can. If not, I will try to fix it. I would want a submission of a statement of hours that you worked on it.

MR. BELKIN: Thank you, your Honor.

MR. GERACI: Thank you.